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No. 06- 06-211

IN THE
Supreme Court of the United States

JOHN GILMORE,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Transportation Security Agency (TSA) uses a directive that it claims requires airline passengers, as a prerequisite to boarding a flight, to show identification or undergo further security screening. This directive affects millions of airline passengers each year. The government acknowledges not only the directive's existence, but also its purported contents. TSA nonetheless refuses to actually disclose the directive.

The Question Presented is:

May the government keep secret a directive that is generally applicable to millions of passengers every day notwithstanding that it (i) has acknowledged both the directive's existence and its contents, and moreover (ii) has identified no special circumstance that nonetheless justifies secrecy.

RULE 14.1(B) STATEMENT

Petitioner, who was Plaintiff below, is John Gilmore.

Respondents, who were Defendants below, are Alberto R. Gonzales, in his official capacity as Attorney General of the United States; Robert Mueller, in his official capacity as Director of the Federal Bureau of Investigation; Marion C. Blakely, in her official capacity as Administrator of the Federal Aviation Administration; Kip Hawley, in his official capacity as Director of the Transportation Security Administration; Michael Chertoff, in his official capacity as Secretary of the Office of Homeland Security; and Southwest Airlines. In addition, Maria Cino, in her official capacity as Secretary of Transportation, is Respondent herein, having replaced Norman Mineta, former Secretary of Transportation, who was Defendant below, pursuant to Fed. R. Civ. P. 25(d)(1).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Gilmore respectfully seeks a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in *Gilmore* v. *Gonzales, et al.*, No. 04-15736.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 435 F.3d 1125. Pet. App. 1a-26a. The relevant order of the district court, Pet. App. 27a-41a, is unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its decision on January 26, 2006. Pet. App. 2a. A timely petition for rehearing was denied on April 5, 2006. Pet. App. 42a. Justice Kennedy extended the time for filing a petition for a writ of certiorari until August 4, 2006. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

The relevant statutes and regulatory provisions – 49 U.S.C. 114(s), 40119, 44902 and 49 C.F.R. 1520.5, 1542.303 – are reproduced at Pet. App. 43a-54a.

STATEMENT OF THE CASE

Petitioner, attempting to board a domestic flight, was advised that he was required to show identification. This rule is applied hundreds of millions of times every year. The government has acknowledged that this requirement is imposed by a directive,

and has further acknowledged what it claims are the directive's contents. But it nonetheless insists on keeping the directive secret. Petitioner brought this suit, alleging that it is unlawful to impose a legal requirement on an individual and acknowledge the source and content of the requirement, but simultaneously withhold the basis for that legal duty. The lower courts rejected that claim.

1. Various statutory provisions govern airport security screening. The Under Secretary of Transportation is directed to "provide for the screening of all passengers and property." 49 U.S.C. 44901(a). In addition, the Under Secretary must direct airlines to "refuse to transport * * * a passenger who does not consent to a search * * * establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive or other destructive substance." *Id.* § 44902(a).[1] Neither of these statutes mentions passenger identification.

Other provisions of federal law govern the question of whether legal requirements – such as those governing security screening – must be made public. Congress has generally forbidden the use of secret law. For example, the Federal Register Act – which dates to 1935 – requires the disclosure of all "Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof." 44 U.S.C. 1505(a). Under the statute, "every document or order which prescribes a penalty has general applicability and legal effect." *Ibid.* Section 1507 further provides that "[a] document required by section 1505(a) of this title to be published in the

[1] The Under Secretary was originally the head of the TSA. Congress later transferred the responsibilities of the Under Secretary and the TSA from the Department of Transportation to the Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. 203(2)).

Federal Register is not valid as against a person who has not had actual knowledge of it until the duplicate originals or certified copies of the document have been filed with the Office of the Federal Register and a copy made available for public inspection as provided by section 1503 of this title." An implementing regulation explains that a rule of general applicability is "any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, and relevant or applicable to the general public * * *." 1 C.F.R. 1.1. The Freedom of Information Act (FOIA) similarly requires publication of "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. 552(a)(1)(D).

There are narrowly tailored exceptions to the requirement of disclosure. 49 U.S.C. 114(s) provides that notwithstanding FOIA, TSA is authorized, upon making particular findings, to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act * * * or under chapter 449 of this title * * *." 49 U.S.C. 114(s). These findings include a required administrative determination that disclosure is inappropriate for specified reasons, principally because it would "be detrimental to the security of transportation." *Ibid.* See also *id.* § 40119(b)(1) (parallel provision governing Department of Homeland Security, Secretary of Transportation, similarly authorizing nondisclosure upon such a finding of "information obtained or developed in ensuring [transportation] security").

TSA's implementing regulations address "sensitive security information" (SSI) that the agency will refuse to disclose pursuant to the just-cited statutory provisions. The regulations define SSI to include, for example, all "[t]hreat information,"

"[s]ecurity measures," and "[s]ecurity screening information." 49 C.F.R. 1520.5(b)(7)-(9). But the regulations go further to define as SSI "[a]ny Security Directive or order" issued under relevant regulatory provisions, together with "[a]ny comments, instructions, and implementing guidance pertaining thereto." *Id.* § 1520.5(b)(2). A "Security Directive" is the document setting forth "mandatory measures" that airports and TSA personnel must follow in conducting airport screening. *Id.* § 1542.303(a). Every "Security Directive or Information Circular, and information contained in either document," is forbidden to be disclosed "to persons other than those who have an operational need to know." *Id.* § 1542.303(f)(2).

2. This case involves the TSA requirement that all passengers show identification before they are permitted to board a domestic commercial airline flight in the United States. The government categorically refuses to make public the document that imposes this legal obligation on commercial airline passengers.

The "secrecy" surrounding this directive is quite unusual in two respects. First, although the *document* itself is withheld from public disclosure, *its requirements* are disclosed every day to millions of people, who are advised that they must show identification.[2] Thus, the government's "secrecy" does not involve keeping sensitive information non-public. What is at stake is instead the government's refusal to prove that what it claims is the law is, in fact, required.

Second, and relatedly, it appears that the directive or implementing guidance purposefully or inadvertently causes transportation security officials to mislead the public.

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[2] This is true with the caveat that (as discussed in the next paragraph) the public is misinformed that it must provide identification, when passengers actually have the alternative option of undergoing additional security screening. But this alternative option is not a secret; the government acknowledged it in the course of this litigation. See *infra* at p. 8.

Passengers are consistently advised that federal law requires them to show identification. That representation is false, however. There is another option. Passengers in reality can generally travel even without showing proper identification so long as they undergo a more extensive security screening. The government's "secrecy" here in refusing to disclose the actual directive thus has the effect of misinforming the public of what the law actually requires.

3. Petitioner John Gilmore was one of the founding employees of Sun Microsystems. On Independence Day 2002 he twice attempted to board flights to the nation's capital, once from San Francisco and once from Oakland, California. Pet. App. 5a-6a. The purpose of the trip was to "petition the government for redress of grievances – specifically, the requirement for airline travelers to provide identification." C.A. E.R. 5 (Complaint).

At both airports, petitioner observed standard security signage, which states the following: "Notice From the Federal Aviation Administration: PASSENGERS MUST PRESENT IDENTIFICATION UPON INITIAL CHECK-IN." C.A. E.R. 6 (Complaint); Pet. App. 6a. Consistent with that requirement, petitioner repeatedly was directed to show identification. In response to his inquiries, he was sometimes advised that he must show official identification to fly, and other times advised that he could still travel if he underwent further screening. His requests to see the document imposing the identification requirement were denied. Gilmore was refused the right to travel on one airline, despite having been physically searched, because he did not show his identification. He would not consent to the more invasive search demanded by the other airline in lieu of showing his identification, and was refused the right to travel there as well. Gilmore has not flown domestically since.

Two weeks after these events, petitioner brought this suit. Petitioner's complaint alleged, *inter alia*, that the government could not lawfully withhold the directive requiring passengers to present identification. The district court held that it lacked jurisdiction over the principal elements of petitioner's suit, which it concluded was a challenge to TSA and FAA regulations that must be filed in the court of appeals. Pet. App. 32a, 33a-34a (citing 49 U.S.C. 46110). Because the government would not disclose the directive even to the district judge, the court recognized that it was "unable to conduct any meaningful inquiry as to the merits" of petitioner's claim that the regulatory scheme is void for vagueness. *Id.* 34a. The district court recognized petitioner's contention that the directive implicates his right to travel and his First Amendment right to association, but held that those rights were not sufficiently impinged to be violated. *Id.* 38a-40a.

4. Petitioner sought review in the Ninth Circuit. In that court, the government sought leave to file the directive under seal for *in camera* review. Counsel for the government suggested their own apparent regret for their inability to provide the court or petitioner with the directive itself. See Mot. to File Materials and Opposing Brief Under Seal, for *In Camera* and *Ex Parte* Review, at 1-2, 7-8. The categorical prohibition on disclosing SSI, they advised the court of appeals, made any other course impossible. See *id.* at 2, 4.

The court of appeals denied that motion but later requested, over the objections of petitioner and the media amici, that the government file under seal relevant material pertaining to the identification requirement. Order, *Gilmore* v. *Gonzales*, No. 04-15736 (Dec. 8, 2005). On the basis of that material, the Ninth Circuit agreed that jurisdiction in the first instance was appropriately before it. It specifically concluded that the directive was an administrative order, which by statute may be challenged only through a petition for review in the court of appeals. Pet. App. 12a-13a & n.8 (citing 49 U.S.C. 46110).

The Ninth Circuit further concluded that it should reach the merits of petitioner's claims because it was appropriate to transfer the case from the district court to the court of appeals. Pet. App. 13a-14a (citing 28 U.S.C. 1631). On the basis of its "determin[ation] that the Security Directive constitutes SSI," the court of appeals also concluded that the directive does "not have to be disclosed to [petitioner]." Pet. App. 13a n.8.

With respect to the contents of the directive, the government acknowledged that, despite its previous claims that complete secrecy was required, it had publicly acknowledged the directive's existence, and some of its substance. Brief of United States, *Gilmore* v. *Ashcroft*, No. 04-15736 (9th Cir. filed Sept. 30, 2004), available at 2004 WL 2448094, at *14-*15 ("U.S. C.A. Br."). A Federal Register entry thus states:

> TSA may publicly release some SSI to help achieve compliance with security requirements. For instance, as part of its security rules, TSA requires airlines to ask passengers for identification at check-in. Although this requirement is part of a security procedure that is SSI, TSA has released this information to the public in order to facilitate the secure and efficient processing of passengers when they arrive at an airport. In this type of situation, TSA must determine whether releasing certain portions of security procedures will improve transportation security to a greater extent than maintaining the confidentiality of the procedure.

Protection of Sensitive Security Information, 69 Fed. Reg. 28066, 28070-71 (May 18, 2004).

The government went further than the Federal Register entry, however, and acknowledged that the directive provides an alternative to providing identification: "Millions of people

board airplanes every year and routinely show identification before boarding. * * * In the alternative, a passenger can submit to a more extensive search rather than show identification." U.S. C.A. Br., 2004 WL 2448094, at *15. See also *id.* at *16 ("the only reason [petitioner] was not permitted to [board] was that he refused to either show identification or submit to a search").[3] The court of appeals, having reviewed the directive, similarly described "the Government's civilian airline passenger identification policy" as "requir[ing] airline passengers to present identification to airline personnel before boarding or be subjected to a search that is more exacting than the routine search that passengers who present identification encounter." Pet. App. 3a. See also *id.* 12a (directive "require[es] airline passengers to present identification or be a 'selectee'").

The court of appeals recognized that "Gilmore's claims * * * implicate the rights of millions of travelers" (Pet. App. 14a), but rejected his contention that the directive violates due process. First, the court of appeals reasoned, the directive is not impermissibly vague because it is not "penal in nature," in that it "does not impose any criminal sanctions, or threats of prosecution, on those who do not comply. Rather, it simply prevents them from boarding commercial flights." Pet. App. 17a. Second, petitioner "had actual notice of the identification policy." *Ibid.* The court of appeals – apparently disclosing the *actual* requirements of the directive – found it decisive that airline personnel "told him that in order to board the aircraft, he must either present identification or be subject to a 'selectee' search." *Ibid.* The court further concluded that "because all passengers must comply with the identification policy" it had

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[3] The government erred in making this assertion. A Southwest employee at the boarding gate turned Gilmore away, and gave his seat to another passenger – without offering Gilmore a search alternative – because Gilmore did not present his identification to that employee, contrary to the TSA's secret directive. C.A. E.R. 5 (Complaint).

publicly described, "the policy does not raise concerns of arbitrary application." *Id.* 18a. Like the district court, the court of appeals acknowledged that the directive affects petitioner's ability to exercise his right to travel and his right to assemble and petition the government, but held that neither was sufficiently implicated to be deemed violated. *Id.* 18a-21a, 24a-26a.

5. After the court of appeals denied rehearing en banc, this petition followed.

REASONS FOR GRANTING THE WRIT

This case presents a profound question of federal law in a context that directly affects millions of individuals every day. The government has promulgated a directive that requires individuals to provide identification or undergo additional security screening before boarding a domestic airline flight. The government moreover acknowledged to the Ninth Circuit the directive's existence and its contents (although it still mischaracterizes the contents of that directive to the public). But it nonetheless refuses to actually release the directive, despite failing to offer *any* justification for its secrecy. The government's position, and the court of appeals' decision sustaining it, is contrary to basic due process principles. Under our system of laws, it is not sufficient for the Executive, charged under the Constitution with administering the laws, simply to *assure* the public as to what the law requires. That inevitably results in arbitrary enforcement of the law. There instead is a basic due process right to actually *see* the law. Stripped of that right, individuals are seriously disadvantaged in their ability to protect their rights in a court of law, debate existing policy and petition the government for change.

This is moreover the ideal case in which to take up the question whether the government may, without special justification, promulgate "secret law." The facts perfectly

illustrate the dangers that such secrecy creates, for the government continues to misrepresent the law to millions of passengers every day. The standard security signage, which petitioner encountered, falsely states that passengers "MUST PRESENT IDENTIFICATION." Pet. App. 6a. As recently as March 2006, TSA's web-site advised would-be travelers:

> If you have a paper ticket for a domestic flight, passengers age 18 and over must present one form of photo identification issued by a local state or federal government agency (e.g.: passport/drivers license/military ID), or two forms of non-photo identification, one of which must have been issued by a state or federal agency (e.g.: U.S. social security card). * * *
>
> For e-tickets, you will need to show your photo identification and e-ticket receipt to receive your boarding pass.

Pet for Rhg. Addendum, at 1. The directive moreover directly implicates airline passengers' constitutional rights to travel and assemble. The need for openness, rather than secrecy, is accordingly at the apex in this case.

Certiorari should be granted, and the judgment reversed.

A. The Government's Insistence on Deeming the Directive a "Secret" – Notwithstanding That It Acknowledges the Directive's Existence and Its Contents – Violates Due Process.

1. "[A] government of laws, and not of men," the great Chief Justice wrote, is the "very essence of civil liberty." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). But we are only a government of laws if the citizenry is genuinely informed about the law's requirements. Liberty cannot thrive if the laws

that can strangle it can freely be hidden from public view, debate, and challenge. Our "democratic decision-making institutions" cannot function if the citizenry is deprived of the information it needs in order to evaluate governmental policies. BREYER, ACTIVE LIBERTY 39 (2005).

That principle is embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments. The predicate to the many decisions of this Court and others prohibiting the enforcement of vague laws is the fundamental principle that the public is entitled to know the terms of the laws being enforced against it. "Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.'" *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939)). As this Court has explained, "the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law." *City of Chicago* v. *Morales*, 527 U.S. 41, 58 (1999). Indeed, the enforcement of laws which do not adequately convey their terms "would be like sanctioning the practice of Caligula who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.'" *Screws* v. *United States*, 325 U.S. 91, 96 (1945) (citation omitted).

"Secrecy in government is fundamentally anti-democratic * * * ." *New York Times Co.* v. *United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring). Secret law not only transgresses basic norms of fairness, but also is flatly inconsistent with the very form of government established by the Constitution. "The general availability of government information is the fundamental basis upon which popular sovereignty and the consent of the governed rest." Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 7 (1957). Governmental openness is key to the preservation of

democratic government because "[w]ithout publicity, all other checks [on government] are insufficient * * *." 1 Bentham, *Rationale of Judicial Evidence* 524 (1827), quoted in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 596 (1980). Openness and publicity "appear[ed] to [Bentham] the strongest shield against temptations, the strongest incentive for maintaining responsibility." Kraus, *Democratic Community and Publicity*, in II NOMOS, COMMUNITY 248 (Friedrich ed. 1959) (citing Bentham, *Essay on Political Tactics in Political Assemblies*).

Ultimately, secrecy stands in the way of what the Founders considered to be the most important check on governmental power: a knowledgeable citizenry. An "informed public opinion is the most potent of all restraints upon misgovernment." *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936). Perhaps "the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry – in an informed and critical public opinion which alone can here protect the values of democratic government." *New York Times Co.*, 403 U.S. at 728 (Stewart, J., concurring). In a system in which "information is kept secret, public deliberation cannot occur [and] the risks of self-interested representation and factional tyranny increase dramatically." Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 894 (1986). See also Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385, 398 (1984) ("[p]ublic laws * * * restrain official arbitrariness that otherwise might interfere with individual decisionmaking"). "An unlimited power to withhold information could be used in a way that would destroy government by consent, the separation of powers, checks and balances, and the creative and disciplinary role of free inquiry." Parks, *Open Government Principle*, at 10. See also *Cox* v. *U.S. Dep't of Justice*, 576 F.2d 1302, 1309 (8th Cir. 1978) ("[f]ar

from impeding the goals of law enforcement, in fact, the disclosure of information clarifying an agency's substantive or procedural law serves the very goals of enforcement by encouraging knowledgeable and voluntary compliance with the law"). Secret law thus is contrary to the very underpinning of our constitutional form of government.

As Jeremy Bentham recognized, secrecy undermines the very purpose of a society's laws: "That a law may be obeyed, it is necessary that it should be known." Bentham, *Of Promulgation of the Laws*, in 1 WORKS OF JEREMY BENTHAM 157 (Bowring ed. 1843). Bentham "considered that every practicable means should be adopted for bringing before the eyes of the citizen the laws he is called on to obey." Burton, *Introduction to the Study of the Works of Jeremy Bentham*, in 1 WORKS OF JEREMY BENTHAM 58. "If your laws of procedure favour the impunity of crimes; if they afford means of eluding justice, of evading taxes, of cheating creditors, it is well that they remain unknown. But what other system of legislation besides this will gain by being unknown?" Bentham, *Of Promulgation of the Laws*, in 1 WORKS OF JEREMY BENTHAM 158. We expect all citizens to conform their behavior to the law's dictates, but "there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him * * *." FULLER, THE MORALITY OF LAW 39 (1964). "The internal morality of the law demands that there be rules [and] that they be made known * * *." *Id.* at 157.[4]

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[4] An analogy is also fairly drawn to the First Amendment principle of open court proceedings. "The principle that justice cannot survive behind walls of silence has long been reflected in the Anglo-American distrust for secret trials." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 573 n.9 (1980) (citation omitted). As one early American source observed, "justice may not be done in a corner nor in any covert manner." *1677 Concessions and Agreements of West New Jersey*, in SOURCES OF OUR LIBERTIES 188 (R. Perry ed. 1959).

2. The nation's history compels the same conclusion. "The safeguards of 'due process of law' * * * summarize the history of freedom of English-speaking peoples running back to the *Magna Carta* and reflected in the constitutional development of our people." *Malinski* v. *New York*, 324 U.S. 401, 413-414 (1945) (Frankfurter, J., concurring). Thus, a governmental practice that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," violates due process. *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934). See also *Hurtado* v. *California*, 110 U.S. 516, 535 (1884) (due process identified with "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions").

Open and published laws are a basic building block of our constitutional form of government, "rooted in the traditions and conscience of our people." *Snyder*, 291 U.S. at 105. Thus, it is no surprise that the Founders viewed openness as an absolute requirement of the system of government they sought to establish. As James Madison recognized, echoing Bentham, "the right of freely examining public characters and measures, and of free communication thereon, is *the only effective guardian of every other right.*" 6 WRITINGS OF JAMES MADISON 398 (1906) (emphasis added). Accord FULLER, MORALITY OF LAW, at 149 ("from the first," our Founders "assumed as a matter of course that laws ought to be published"); Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 139-140 (2006) ("open government is among the basic principles on which this nation was founded"); Relyea, *The Coming of Secret Law*, 5 GOV'T INFO Q. 97, 97 (1988) ("[p]ublication of the law * * * constitutes a foundation stone of the self-government edifice").

To ensure that the laws were published and available to citizens, the first Congress ordered the Secretary of State to "'cause every [enacted] law, order, resolution, and vote to be

published in at least three of the public newspapers printed within the United States.'" Relyea, *The Coming of Secret Law*, at 98 (quoting 1 Stat. 68). Ten years later, Congress modified that mandate and requested that the Secretary of State publish its enactments in "at least * * * one of the public newspapers printed within each state" or more, if necessary to insure that the public was informed. *Id.* at 99. Similarly, in 1795, Congress authorized the Secretary to State to arrange for the publication of 5,000 sets of the statutes passed since 1789, and the same number for each successive sitting of Congress. *Ibid.* "All except 500 of these sets were to be distributed to the states and territories 'to be deposited in such fixed and convenient place in each county'" that would be the "'most conducive to the general information of the people.'" *Ibid.* (quoting 1 Stat. 443). From the very beginning, then, Congress established official, routine publication and distribution of the laws.

The Founders' perspective was rooted in the settled principle that secret law was inimical to a free society. Blackstone emphasized that laws must be "*prescribed*" because "a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be *properly a law*." Blackstone, *Of the Nature of Laws in General*, in COMMENTARIES ON THE LAWS OF ENGLAND (1765-1769) (second emphasis added). Rather, "[i]t is requisite that this resolution be notified to the people who are to obey it * * * in the most public and perspicuous manner." *Ibid.* Blackstone, too, warned against Caligula's attempts to enforce laws that nobody could see. *Ibid.* To Blackstone, a secret law was no law at all.

The development of English law, and England's consistent early practice of committing laws to writing, available to the public, establish that this tradition has deep, well-established roots in the common law. Indeed, the first significant work known, the "English Laws," comprised a small series of books apparently prepared nearly nine hundred years ago, in 1115;

the "Laws of Henry I" followed in approximately 1118. JENKS, A SHORT HISTORY OF ENGLISH LAW 18 (1922). Jenks traces the ancient development of law in England, and the many works published to catalogue those laws. *Id.* at 18-25. Included among these ancient laws are the Assises – formal regulations – "made by the King for the direction of his officials." *Id.* at 23. Jenks explains that although "in theory, they did not profess to affect the conduct of the ordinary citizen," in practice they had a "substantial effect in that direction; because the royal officials, in their dealings with private persons, acted upon them, and took good care that they should control the course of business." *Ibid.* Of these Assises, dating between 1166 and 1184, Jenks declares that "it is hardly possible to exaggerate the importance for this period." *Id.* at 23-24.

Jenks describes as "[t]he second great triumph" of the early English development of law "the establishment of a new set of royal tribunals, with a definite legal procedure" – the writ. *Id.* at 39. Through the Assises, England had begun to catalogue substantive law, applicable to the public. *Id.* at 40-41. But this was not enough. Until the establishment of the writ procedure, "the definition of offences had been left to the 'doomsmen' of the court, in whose memory was supposed to lie a store of immemorial wisdom. There were no written records; nothing to which the aggrieved party could turn, to see whether the court would give him a remedy." *Id.* at 44-45. Jenks explains that with a writ, however, "[n]ow, he knew that if he could get his complaint described in a royal message, he could hardly be met by the defence that such complaint 'disclosed no cause of action.'" *Id.* at 45. Jenks declared that "it was a great step gained to have it declared, or at least implied, that, if the facts were as alleged, the plaintiff had a good ground of complaint; and this result was achieved when it was clear that any one could have, as of course, a writ of Debt, or Trespass, or the

like." *Ibid.* This procedure was well entrenched "before the end of the twelfth century." *Ibid.*

Ultimately, the writs "'original,' *i.e.* writs destined to commence legal proceedings," "were collected into a Register, of which more or less correct copies were in circulation," which "really became a dictionary of the Common Law." *Ibid.* In that same time period – approximately 1215 – the *Magna Carta*, the historic compilation of English law, was published. See *Treasures in Full – Magna Carta*, available at http://www.bl.uk/treasures/magnacarta/translation.html (last visited Aug. 1, 2006). Thus, by 1250, with the adoption of the *Magna Carta* and the making and circulation of the writs, publication of the English common law had begun. See JENKS, SHORT HISTORY OF ENGLISH LAW, at 45. Over the next hundred years, these laws were codified in statutes designed to structure life in the middle ages. *Id.* at 131 (statute enacted in 1330 to govern estate law); 146 (clause in the statute of 1315 governs defamation law); 150 ("the great Statute of Treasons" was codified in 1352). In short, during the hundred years before the United States was founded, written law flourished in England, with statutes, judicial decisions and executive orders being published and updated regularly. *Id.* at 187-190.

3. The foregoing authorities establish that the government cannot, consistent with Due Process, maintain "secret law" without some special justification, such as a legitimate need for secrecy to protect national security. The facts of this case plainly involve no special justification; indeed, the court of appeals required the government to provide no basis whatsoever for the continued secrecy of the directive. Nor could a persuasive justification be offered, for in the court of appeals the government acknowledged what it claims is the substance of the directive's requirements. In these circumstances, the government cannot justify its continued secrecy. Rather, the public is entitled to demand more than the Executive's assurances regarding what the law requires.

Forbidden from seeing the directive, the public is seriously disadvantaged in understanding, assessing, and debating its requirements (including any changes in its requirements), all of which lie at the heart of the democratic process. More fundamentally, the government may not *enforce* any law against the general public if it denies the public the right to see that law, absent special justification.

B. Alternatively, This Court Should Reject the Court of Appeals' Determination That the Directive Is SSI and Hence Immune from Disclosure.

The grave constitutional question raised by the government's illogical position in this case is easily avoided. This Court could simply reverse the Ninth Circuit's determination (Pet. App. 13a n.8) that the directive is properly withheld from public disclosure as SSI. Settled principles of constitutional avoidance counsel in favor of adopting that course. See, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).[5]

As discussed *supra* at pp. 2-3, Congress has broadly provided that generally applicable laws and regulations must be publicly disclosed. The statutes governing transportation security contain limited exceptions to those requirements, for certain regulations. As is relevant here, TSA may "prescribe

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[5] Because this issue was "passed upon" by the court of appeals, it is within this Court's jurisdiction. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992). The issue is also logically antecedent to the constitutional question decided by the court of appeals and therefore appropriately before this Court for decision. See *United States Nat'l Bank of Ore.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 440 (1993) ("a court may consider an issue antecedent to and ultimately dispositive of the dispute before it, even if the parties fail to identify and brief the issue"); *Town of Arcadia* v. *Ohio Power Co.*, 498 U.S. 73, 77 (1990) (considering issue logically antecedent to those decided by court of appeals).

regulations prohibiting the disclosure of *information* obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act or under chapter 449 of this title." 49 U.S.C. 114(s) (emphasis added). Secrecy is permitted only if TSA makes a further finding justifying nondisclosure – in this context, a finding that disclosure would "be detrimental to the security of transportation." *Ibid.*

The directive fails *both* of the requirements imposed by Congress for deeming materials relating to transportation security to be secret. The directive is not reasonably understood as "information," which is commonly defined as "the communication or reception of knowledge or intelligence"; "knowledge obtained from investigation, study, or instruction"; "intelligence, news"; and, "facts, data." Merriam-Webster Online Dictionary, available at http://m-w.com/dictionary/information (last visited Aug. 1, 2006). Nor does anything in the legislative history for Section 114(s) suggest that Congress intended "information" to be interpreted broadly enough to encompass laws that govern the conduct of the general public. Instead, the directive is a "substantive rule[] of general applicability" that must be disclosed. 5 U.S.C. 552(a)(1)(D).[6]

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[6] See *Sterling Drug Inc.* v. *F.T.C.*, 450 F.2d 698, 708 (D.C. Cir. 1971) ("[t]hese are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public"). As this Court explained in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975), FOIA "represents a strong congressional aversion to 'secret [agency] law' * * * and represents an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law.'" (citations omitted; insertion in original.) Indeed, "[FOIA's] indexing and reading-room rules indicate that the primary objective is the elimination of 'secret law.' Under the FOIA an agency must disclose its rules governing relationships with private parties and its demands on private conduct." *U.S. Dep't of Justice* v. *Reporters' Comm. for Freedom of the Press*, 489 U.S. 749, 772 n.20 (1989) (citation omitted); accord *Tax Analysts* v. *I.R.S.*, 117 F.3d 607, 617 (D.C. Cir. 1997) ("[a] strong theme of our [deliberative

More importantly, it is not plausible for TSA to argue that the directive must be kept secret in order to maintain the "security of transportation." 49 U.S.C. 114(s). The government has never explained how the withholding of the directive document – as opposed to the substance of its requirements – in any way enhances security. By the time of its filings in the court of appeals, the government was willing to freely acknowledge what it claims the directive requires. But it inexplicably refuses to release the actual document that contains those requirements.[7]

The unacceptable result of the government's insistence on secrecy for the directive itself is that the directive has been arbitrarily enforced, with some airline personnel enforcing the directive as reflected on signs in every airport in the nation (requiring identification to fly commercially) and others

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process] opinions has been that an agency will not be permitted to develop a body of 'secret law'") (citations, quotation marks omitted); *Nat'l Treasury Employees' Union* v. *U.S. Customs Serv.*, 802 F.2d 525, 531 (D.C. Cir. 1986) (FOIA "[e]xemption (b)(2) emphatically does not authorize the promulgation of 'secret law' governing members of the public, and such documents would be unprotected whether or not disclosure threatened to make them operationally obsolete").

Thus, courts generally have agreed that all generally applicable laws – regardless of how they are characterized – must be published. See, *e.g.*, *United States* v. *Aarons*, 310 F.2d 341, 345-346 (2d Cir. 1962) (order closing portion of harbor while submarine launched "prescribed 'a course of conduct' for 'the general public' or 'the persons of a locality'" and therefore "publication was required"); *Cox*, 576 F.2d at 1309 (portions of agency manual "clarifying substantive or procedural law must be disclosed" under FOIA); *Stokes* v. *Brennan*, 476 F.2d 699, 703 (5th Cir. 1973) (training manual describing agency's implementation of statute must be disclosed under FOIA).

[7] In the briefing before the court of appeals, counsel to the government declined to release the directive based only on the flat statutory prohibition on releasing any material that TSA had deemed to be SSI, not out of any expressed concern that disclosure would in fact endanger transportation security. See *supra* at p. 6.

apparently enforcing the directive as purportedly written (permitting commercial air travel without identification if the traveler submits to a more extensive search). No good reason exists for the government claim that it is entitled to withhold the directive from the public, particularly in the face of consistent caselaw from this Court and other federal courts mandating that all generally applicable laws be published.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

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August 2006

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[8] Nor is there any basis to object to disclosure on the ground that the directive contains *other* information that must be kept secret. The statutorily required finding that secrecy is necessary for security applies to the "information" in question, not the directive as a whole. 49 U.S.C. 114(s). Laws that otherwise must be disclosed may not be shielded by burying them among secrets. Other information within the directive that is properly withheld can simply be redacted. Cf. *Cuneo* v. *Schlesinger*, 484 F.2d 1086, 1090-1091 (D.C. Cir. 1973) (ordering disclosure of portions of manual that "either create or determine the extent of the substantive rights and liabilities of a person affected by those portions").

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN GILMORE,

Plaintiff-Appellant,

v.

ALBERTO R. GONZALES, in his official capacity as Attorney General of the United States; ROBERT MUELLER, in his official capacity as Director of the Federal Bureau of Investigation; NORMAN MINETA, in his official capacity as Secretary of Transportation; MICHAEL CHERTOFF, in his official capacity as Secretary of the Department of Homeland Security; UAL CORPORATION, aka United Airlines; SOUTHWEST AIRLINES; MARION C. BLAKELY, in her official capacity as Administrator of the Federal Aviation Administration; KIP HAWLEY, in his official capacity as Director of the Transportation Security Administration,

Defendants-Appellees.

No. 04-15736

D.C. No.
CV-02-03444-SI

OPINION

Appeal from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted
December 8, 2005 – San Francisco, California

Filed January 26, 2006

Before: Stephen S. Trott, Thomas G. Nelson, and Richard A. Paez, Circuit Judges.

Opinion by Judge Paez

COUNSEL

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Lee Tien and Kurt Opsahl, San Francisco, California, for amicus Electronic Frontier Foundation.

Marc Rotenberg and Marcia Hofmann, Washington, D.C., for amicus Electronic Privacy Information Center.

Deborah Pierce and Linda Ackerman, San Francisco, California; Rachel Meeropol, New York, New York, for amici The Center for Constitutional Rights and Privacy Activism.

Reginald T. Shuford and Catherine Y. Kim, New York, New York; Aaron Caplan, Seattle, Washington; Michael E. Kipling, Summit Law Group, Seattle, Washington, for

amici American Civil Liberties Union Foundation and American Civil Liberties Union for Washington.

OPINION

PAEZ, Circuit Judge.

John Gilmore ("Gilmore") sued Southwest Airlines and the United States Attorney General, Alberto R. Gonzales, among other defendants,[1] alleging that the enactment and enforcement of the Government's civilian airline passenger identification policy is unconstitutional. The identification policy requires airline passengers to present identification to airline personnel before boarding or be subjected to a search that is more exacting than the routine search that passengers who present identification encounter. Gilmore alleges that when he refused to present identification or be subjected to a more thorough search, he was not allowed to board his flights to Washington, D.C. Gilmore asserts that

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[1] Gilmore also named the following federal defendants: Robert Mueller, in his official capacity as Director of the Federal Bureau of Investigation ("FBI"); Norman Mineta, in his official capacity as Secretary of Transportation; Marion C. Blakely, in her official capacity as Administrator of the Federal Aviation Administration ("FAA"); Kip Hawley, in his official capacity as Director of the Transportation Security Administration ("TSA"); and Michael Chertoff, in his official capacity as Secretary of the Office of Homeland Security. Where necessary, the current federal defendants have been substituted for the originally named defendants pursuant to Fed. R. Civ. P. 25(d)(1). The federal defendants, including Alberto R. Gonzales, are collectively referred to as "the Government."

Southwest Airlines and the Government are collectively referred to as "Defendants." Gilmore also named United Airlines as a defendant. In dismissing this action against Defendants, the district court also dismissed the complaint against United Airlines without prejudice. United Airlines has not appeared in this court.

because the Government refuses to disclose the content of the identification policy, it is vague and uncertain and therefore violated his right to due process. He also alleges that when he was not allowed to board the airplanes, Defendants violated his right to travel, right to be free from unreasonable searches and seizures, right to freely associate, and right to petition the government for redress of grievances.

Before we address the merits of Gilmore's claims, we must consider the jurisdictional and standing issues raised by Defendants. The Government contends that the district court lacked subject matter jurisdiction to entertain this action because, under 49 U.S.C. § 46110(a), Gilmore's claims can only be raised by a petition for review in the courts of appeal. Defendants also contend that Gilmore lacks standing to challenge anything other than the identification policy, such as the Consumer Assisted Passenger Prescreening System ("CAPPS") and so-called No-Fly and Selectee lists. The district court determined that Gilmore had standing to challenge only the identification policy, and that it lacked jurisdiction to hear Gilmore's due process challenge.[2] After reviewing the sensitive security information materials that the Government filed with this court *ex parte* and *in camera*, we agree with the Government that the district court lacked jurisdiction and that Gilmore had standing to challenge only the identification policy.

[2] The district court did not address the jurisdictional issue as it relates to Gilmore's remaining claims, and instead addressed only the merits of these claims.

However, as explained below, we transfer Gilmore's complaint to this court pursuant to 28 U.S.C. § 1631 and treat it as a petition for review. Accordingly, we address the merits of each of Gilmore's constitutional claims with respect to the identification policy. We hold that neither the identification policy nor its application to Gilmore violated Gilmore's constitutional rights, and therefore we deny the petition.

Background

On July 4, 2002, Gilmore, a California resident and United States citizen, attempted to fly from Oakland International Airport to Baltimore-Washington International Airport on a Southwest Airlines flight. Gilmore intended to travel to Washington, D.C. to "petition the government for redress of grievances and to associate with others for that purpose." He was not allowed to fly, however, because he refused to present identification to Southwest Airlines when asked to do so.

Gilmore approached the Southwest ticketing counter with paper tickets that he already had purchased. When a Southwest ticketing clerk asked to see his identification, Gilmore refused. Although the clerk informed Gilmore that identification was required, he refused again. Gilmore asked whether the requirement was a government or Southwest rule, and whether there was any way that he could board the plane without presenting his identification. The clerk was unsure, but posited that the rule was an "FAA security requirement." The clerk informed Gilmore that he could opt to be screened at the gate in lieu of presenting the requisite identification. The clerk then issued Gilmore a new boarding pass, which indicated that

he was to be searched before boarding the airplane. At the gate, Gilmore again refused to show identification. In response to his question about the source of the identification rule, a Southwest employee stated that it was a government law. Gilmore then met with a Southwest customer service supervisor, who told him that the identification requirement was an airline policy. Gilmore left the airport, without being searched at the gate.

That same day, Gilmore went to San Francisco International Airport and attempted to buy a ticket for a United Airlines flight to Washington, D.C. While at the ticket counter, Gilmore saw a sign that read: "PASSENGERS MUST PRESENT IDENTIFICATION UPON INITIAL CHECK-IN." Gilmore again refused to present identification when asked by the ticketing agent. The agent told him that he had to show identification at the ticket counter, security checkpoint, and before boarding; and that there was no way to circumvent the identification policy. A United Airlines Service Director told Gilmore that a United traveler without identification is subject to secondary screening, but did not disclose the source of the identification policy. United's Ground Security Chief reiterated the need for identification, but also did not cite the source of the policy. The Security Chief informed Gilmore that he could fly without presenting identification by undergoing a more intensive search, i.e. by being a "selectee." A "selectee" search includes walking through a magnetometer, being subjected to a handheld magnetometer scan, having a light body patdown, removing one's shoes, and having one's carry-on baggage searched by hand and a CAT-scan machine. Gilmore refused to allow his bag to be searched by hand and was therefore barred from flying.

The Security Chief told Gilmore that he did not know the law or government regulation that required airlines to enforce the identification policy. Another member of United's security force later told Gilmore that the policy was set out in government Security Directives, which he was not permitted to disclose. He also told Gilmore that the Security Directives were revised frequently, as often as weekly; were transmitted orally; and differed according to airport. The airline security personnel could not, according to the Government, disclose to Gilmore the Security Directive that imposed the identification policy because the Directive was classified as "sensitive security information" ("SSI").[3] Gilmore left the airport and has not flown since September 11, 2001 because he is unwilling to show identification or be subjected to the "selectee" screening process.

Gilmore filed a complaint against Defendants in the United States District Court for the Northern District of California, challenging the constitutionality of several security measures, which he collectively referred to as "the Scheme," including the identification policy, CAPPS and

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[3] Pursuant to 49 U.S.C. § 114(s)(1)(C) (2005), the Under Secretary of the TSA "shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." This information is called "sensitive security information." 49 C.F.R. § 1520.5(a) (2005). The Under Secretary classified as SSI "[a]ny security program or security contingency plan issued, established, required, received, or approved by DOT [Department of Transportation] or DHS [Department of Homeland Security], including . . . [a]ny aircraft operator, airport operator, or fixed base operator security program, or security contingency plan under this chapter" and "[a]ny Security Directive or order . . . [i]ssued by TSA." 49 C.F.R. § 1520.5(b)(1)(i), (b)(2)(i) (2005).

CAPPS II, and No-Fly and Selectee lists.[4] Gilmore alleged that these government security policies and provisions violated his right to due process, right to travel, right to be free from unreasonable searches and seizures, right to freely associate, and right to petition the government for redress of grievances. Gilmore also alleged that "similar requirements have been placed on travelers who use government-regulated passenger trains, and that similar requirements are being instituted for interstate bus travel." Defendants filed separate motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure and failure to state a claim upon which relief can be granted under Rule 12(b)(6).

The district court dismissed Gilmore's complaint against Defendants with prejudice. Specifically, the district court dismissed Gilmore's due process claim because it determined that the court lacked jurisdiction to hear it. The district court, however, did not assess whether it had jurisdiction to hear Gilmore's other claims. Instead, it reached the merits of those claims and determined that each one failed. In granting Defendants' motions, the court, noting that the identification policy had been classified as SSI, did not review any official documentation of the identification policy. Rather, for purposes of its jurisdictional ruling, the district court assumed, as Gilmore alleged, that the identification policy was a Security

[4] The No-Fly and Selectee lists are Security Directives. They were issued by TSA pursuant to 49 U.S.C. § 114(*l*)(2)(A) (2005), which authorizes the TSA Under Secretary to issue Security Directives without providing notice or an opportunity for comment in order to protect transportation security.

Directive issued by TSA. Gilmore timely appealed. Shortly after oral argument in this case, we ordered the Government to file under seal the relevant material pertaining to the identification policy so that we could conduct an *in camera, ex parte* review.

Discussion

I. Jurisdiction & Standing

Jurisdiction

The Government argues that the district court lacked jurisdiction to hear any of Gilmore's claims because 49 U.S.C. § 46110 divested the court of jurisdiction. The relevant provisions of § 46110 state:

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security . . . or the Administrator of the Federal Aviation Administration . . .) in whole or in part under this part, part B, or subsection (*l*) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.
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> . . . .
>
> . . . When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings.

49 U.S.C. § 46110(a), (c) (2005).[5] Accordingly, whether the district court had jurisdiction over Gilmore's claims turns on whether the Security Directive that established the identification policy is an "order" within the meaning of this statute.[6] On the basis of Gilmore's allegations, the district court assumed that the identification policy was a Security Directive issued by TSA, and then determined that the Security Directive is an "order." To complete the jurisdictional inquiry, we must also determine whether the Security Directive was issued by an appropriate government official and under proper authority pursuant to § 46110(a).

"Courts have given a broad construction to the term 'order' in Section 1486(a) [46110's predecessor]." *Sierra*

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[5] In 2003, Congress amended § 46110 to authorize the courts of appeals to review orders issued "in whole or in part under this part, part B, or subsection (*l*) or (s) of section 114." 49 U.S.C. § 46110(a); Pub. L. No. 108-176, § 228, 117 Stat. 2490, 2532 (2003). The prior version restricted the scope of review to orders issued only "under this part." As previously mentioned, TSA can issue Security Directives pursuant to § 114(*l*)(2)(A) "without providing notice or an opportunity for comment." 49 U.S.C. § 114(*l*)(2)(A). Therefore, 49 U.S.C. § 46110(a) allows for courts of appeals to review Security Directives absent prior adjudication. *See, Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119, 1125 (W.D. Wash. 2005).

[6] In the district court, the Government "assumed the truth of the content of the identification policy as alleged in Gilmore's complaint" and refused to confirm or deny its existence. In its brief to this court, however, the Government stated that "TSA has now confirmed the existence of an identification requirement – that 'as part of its security rules, TSA requires airlines to ask passengers for identification at check-in.' *Protection of Sensitive Security Information*, 69 Fed. Reg. 28066, 28070-28071 (May 18, 2004)." Moreover, at oral argument, the Government stated that it "accepts as true" that at "the center of this case is a Security Directive." Therefore, we refer to the security measure that imposed the identification policy as a Security Directive, and analyze whether it is an "order" within the meaning of § 46110(a).

Club v. Skinner, 885 F.2d 591, 592 (9th Cir. 1989). This circuit's case law provides some guidance in defining an "order." As we have explained, finality is key:

> "Order" carries a note of finality, and applies to any agency decision which imposes an obligation, denies a right, or fixes some legal relationship. In other words, if the order provides a "definitive" statement of the agency's position, has a "direct and immediate" effect on the day-to-day business of the party asserting wrongdoing, and envisions "immediate compliance with its terms," the order has sufficient finality to warrant the appeal offered by section [46110].

Crist v. Leippe, 138 F.3d 801, 804 (9th Cir. 1998) (quoting *Mace v. Skinner,* 34 F.3d 854, 857 (9th Cir. 1994)).

Finality is usually demonstrated by an administrative record and factual findings. "The existence of a reviewable administrative record is the determinative element in defining an FAA decision as an 'order' for purposes of Section [46110]." *Sierra Club,* 885 F.2d at 593 (citation omitted). An adequate record, however, may consist of "little more" than a letter. *San Diego Air Sports Ctr., Inc. v. FAA,* 887 F.2d 966, 969 (9th Cir. 1989).[7] As noted, we have

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[7] Prior to submitting the sealed materials for our review, the Government argued that an administrative record is not required for § 46110 to apply. The Government cites to *Nevada Airlines, Inc. v. Bond,* 622 F.2d 1017, 1020 (9th Cir. 1980) as support for this proposition. Unlike this case, *Nevada Airlines* dealt with an FAA emergency revocation order, and therefore was not "the ordinary case." *Id.* at 1020. In justifying the narrow scope of review employed in that case, we noted that "[t]his limited standard of judicial review has been consistently applied in evaluating the propriety of *emergency agency action* under other statutory schemes relating to the public safety and welfare." *Id.* at 1020 n.6. (emphasis added). Because we examined the

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reviewed *in camera* the materials submitted by the Government under seal, and we have determined that the TSA Security Directive is final within the meaning of § 46110(a). The Security Directive "imposes an obligation" by requiring airline passengers to present identification or be a "selectee," and by requiring airport security personnel to carry out the policy. The Security Directive also provides a "definitive statement" of TSA's position by detailing the policy and the procedures by which it must be effectuated. Because the Security Directive prevents from air travel those who, like Gilmore, refuse to comply with the identification policy, it has a "direct and immediate" effect on the daily business of the party asserting wrongdoing. Finally, the Security Directive "envisions immediate compliance." Pursuant to TSA regulations, aircraft operators that are required to maintain approved security programs "must comply with each Security Directive issued to the aircraft operator by TSA, within the time prescribed in the Security Directive for compliance." 49 C.F.R. § 1544.305(b) (2005).

Therefore, having reviewed the TSA Security Directive that requires airline operators to enforce the identification policy, we hold that it is an "order" within the meaning of § 46110(a). We also determine that the Security Directive was issued by an appropriate government official and under proper authority as required by

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available administrative record of the policy at issue, however, this argument is moot.

§ 46110(a).[8] Accordingly, the district court lacked jurisdiction to hear challenges to the identification policy.[9]

Although Gilmore should have brought his claims in the court of appeals in the first instance, "Congress has provided a jurisdiction-saving tool that permits us to transfer the case[ ] to this court and consider the petition[ ] as though [it] had never been filed in the district court." *Castro-Cortez v. INS*, 239 F.3d 1037, 1046 (9th Cir. 2001). In an effort to cure jurisdictional defects, 28 U.S.C. § 1631 allows for the transfer of civil actions among federal courts. Section 1631 authorizes transfers to correct jurisdictional problems "only in cases that are actually transferred or are at least transferable." *Clark v. Busey*, 959 F.2d 808, 812 (9th Cir. 1992). That is, we can transfer a civil case to ourselves if "(1) we would have been able to exercise jurisdiction on the date that [it was] filed in the district court; (2) the district court lacked jurisdiction over

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[8] We also determine that the Security Directive constitutes SSI pursuant to 49 C.F.R. § 1520.5(b)(2)(i), and therefore it did not have to be disclosed to Gilmore.

[9] Although the Security Directive is an "order" within the meaning of 49 U.S.C. § 46110(a), the district court maintains jurisdiction to hear broad constitutional challenges to Defendants' actions. That is, the district court is divested of jurisdiction only if the claims are "inescapably intertwined with a review of the procedures and merits surrounding the . . . order." *Mace*, 34 F.3d at 858. Gilmore's due process vagueness challenge is "inescapably intertwined" with a review of the order because it squarely attacks the orders issued by the TSA with respect to airport security. Moreover, Gilmore's other claims are as-applied challenges as opposed to broad facial challenges. Given that they arise out of the particular facts of Gilmore's encounter with Southwest Airlines, these claims must be brought before the courts of appeals. *See Tur v. FAA*, 104 F.3d 290, 292 (9th Cir. 1997) (distinguishing between a "facial challenge to agency action" and a "specific individual claim"); *Mace*, 34 F.3d at 859.

the case []; and (3) the transfer is in the interests of justice." *Castro-Cortez,* 239 F.3d at 1046 (citing *Kolek v. Engen,* 869 F.2d 1281, 1284 (9th Cir. 1989)).

All three of these conditions are met in this case. First, § 46110(a) expressly gives this court jurisdiction to hear Gilmore's claims, given that he is a resident of California and he challenges an "order." Second, as explained above, the district court lacked jurisdiction to entertain Gilmore's claims. Finally, a transfer of this case to our court to cure the lack of jurisdiction is in the interest of justice. Gilmore's claims call into question the propriety of the Government's airline passenger identification policy and implicate the rights of millions of travelers who are affected by the policy. In these unique circumstances, it is of the utmost importance that we resolve Gilmore's claims without further delay. In sum, justice would best be served by transferring Gilmore's district court complaint to this court and treating it as a petition for review under § 1631.

Standing

Next, we must address the Government's challenge to Gilmore's standing. Gilmore's claims are not limited to the identification policy. Rather, he challenges a host of practices, which he collectively refers to as "the Scheme." The facts of Gilmore's alleged injury are simple. Gilmore went to Oakland International Airport and San Francisco International Airport to board flights to the east coast. He refused to present identification or undergo a more exacting search, in contravention of the policy, and therefore was not allowed to board his flights. In light of these facts,

Defendants argue that Gilmore has standing only to challenge the identification policy.

Although CAPPS and the No-Fly and Selectee lists are predicated upon the results of the identification policy, i.e. the identity of the passenger, Gilmore's alleged injury stems from the identification policy itself, and does not implicate other security programs that depend upon passenger identification information.

To establish standing, a plaintiff must demonstrate three elements:

> First, plaintiffs must clearly demonstrate that they have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Hemp Indus. Ass'n v. DEA, 333 F.3d 1082, 1086 (9th Cir. 2003) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992)). Although Gilmore's complaint describes various airport security programs and policies, the only "injury in fact" that Gilmore alleged was his inability to fly, which clearly stemmed from the identification policy. The fact that the identification policy relates to the other security programs does not mean that Gilmore suffered an "injury in fact" due to these additional programs. Standing, as the Supreme Court stated, "is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996).

Gilmore also challenges the alleged identification policies of other modes of travel, specifically the interstate bus and train systems. Gilmore asserts in his brief to us that he has standing to challenge the Government's identification policies as they relate to other forms of interstate travel because his "right to travel by all modes has been chilled on an ongoing basis – not just in two airports on July 4, 2002." Once again, however, Gilmore fails to establish standing. Gilmore's challenge to the alleged identification systems of other modes of travel is based on one sentence in his fifty-five paragraph complaint. He did not allege that he attempted to board a bus or train, but rather he alleged that he "is also informed and believes and hereby alleges that similar requirements have been placed on travelers who use passenger trains by the government defendants, and that similar requirements are being instituted for interstate bus travel." This sole allegation, however, is insufficient to establish standing. In fine, Gilmore lacks standing to challenge all components of "the Scheme" except the identification policy.

We next turn to the merits of each claim, examining only whether the airline identification policy caused the alleged constitutional violations.

II. Due Process

Gilmore alleges that he was penalized for failing to comply with a law that he has never seen. He argues that the Government's failure to provide adequate notice of the law violates his right to due process and renders the law unconstitutionally vague. The district court did not reach the merits of Gilmore's due process claim because it dismissed the claim on jurisdictional grounds.

In support of his vagueness challenge, Gilmore relies principally on *Kolender v. Lawson,* 461 U.S. 352 (1983), in which the Supreme Court held that a California statute was unconstitutionally vague because it did not clarify the requirement that a person who loiters or wanders on the street provide "credible and reliable" identification when requested by a peace officer. Although the statute was struck down because it was unconstitutionally vague, *Kolender* is easily distinguishable from the present case. The statute in *Kolender,* California Penal Code § 647(e), was penal in nature. In applying the void-for-vagueness doctrine to the statute, the Supreme Court stated that this doctrine "requires that a *penal statute* define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender,* 461 U.S. at 357 (emphasis added). Unlike the penal statute in *Kolender,* the identification policy here does not impose any criminal sanctions, or threats of prosecution, on those who do not comply. Rather, it simply prevents them from boarding commercial flights.

Moreover, Gilmore had actual notice of the identification policy. He alleged that several airline personnel asked him for identification and informed him of the identification policy. They told him that in order to board the aircraft, he must either present identification or be subject to a "selectee" search. He also saw a sign in front of United Airlines' ticketing counter that read "PASSENGERS MUST PRESENT IDENTIFICATION UPON INITIAL CHECK-IN." Although Gilmore was not given the text of the identification policy due to the Security Directive's classification as SSI, he was nonetheless accorded adequate notice

given that he was informed of the policy and how to comply. *See Forbes v. Napolitano,* 236 F.3d 1009, 1011 (9th Cir. 2000) ("[I]ndividuals must be given a reasonable opportunity to discern whether their conduct is proscribed so they can choose whether or not to comply with the law.").

Gilmore also alleges that the Government violated his due process rights because the identification policy vests airline security personnel with unbridled discretion. Upon review of the TSA Security Directive, we hold that the Directive articulates clear standards. It notifies airline security personnel of the identification requirement and gives them detailed instructions on how to implement the policy. Moreover, because all passengers must comply with the identification policy, the policy does not raise concerns of arbitrary application. For all these reasons, we reject Gilmore's due process arguments.

III. Right To Travel

Gilmore alleges that the identification policy violates his constitutional right to travel because he cannot travel by commercial airlines without presenting identification, which is an impermissible federal condition.[10] We reject

[10] Gilmore argues that the identification policy functions as a prior restraint on his ability to travel. Gilmore's argument that we should apply a First Amendment prior restraint analysis is not persuasive. Gilmore cites *Nunez v. City of San Diego,* 114 F.3d 935 (9th Cir. 1997), for the proposition that a First Amendment prior restraint analysis applies to the right to travel context. In *Nunez,* we held that a city juvenile curfew ordinance was unconstitutionally vague and overbroad, violated equal protection, and violated parents' fundamental right to rear their children without undue government interference. The opinion, in addressing a right to travel claim, specifically separated the

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Gilmore's right to travel argument because the Constitution does not guarantee the right to travel by any particular form of transportation.

Because Gilmore lacks standing to challenge anything but the identification policy's impact on air travel, his sole argument is that "air travel is a necessity and not replaceable by other forms of transportation." Although we do not question this allegation for purposes of this petition, it does not follow that Defendants violated his right to travel, given that other forms of travel remain possible.

This circuit's decision in *Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999), is on point. In *Miller*, the plaintiff challenged California's requirement that applicants submit their social security numbers to the DMV in order to obtain valid drivers licenses. The plaintiff alleged that this policy violated his fundamental right to interstate travel and his right to freely exercise his religion. In affirming the district court's dismissal pursuant to Rule 12(b)(6), we concluded that "by denying Miller a single mode of transportation – in a car driven by himself – the DMV did not unconstitutionally impede Miller's right to interstate travel." *Id.* at 1204. Although we recognized the fundamental right to interstate travel, we also acknowledged that "burdens on a single mode of transportation do not

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right to travel discussion from a First Amendment overbreadth claim because "courts have articulated different tests to examine burdens on First Amendment rights and on other fundamental rights." *Id.* at 944 n.6. Moreover, we did not once mention prior restraint in our analysis, but instead applied the overbreadth doctrine. We expressly stated that we did not consider the First Amendment overbreadth challenge based on the right to travel because the "Supreme Court has not applied [the] overbreadth [doctrine] outside the limited context of the First Amendment." *Id.* at 949 n.11.

implicate the right to interstate travel." *Id.* at 1205 (citing *Monarch Travel Servs., Inc. v. Associated Cultural Clubs, Inc.*, 466 F.2d 552, 554 (9th Cir. 1972)).

Like the plaintiff in *Miller,* Gilmore does not possess a fundamental right to travel by airplane even though it is the most convenient mode of travel for him. Moreover, the identification policy's "burden" is not unreasonable. *See Shapiro v. Thompson,* 394 U.S. 618, 629 (1969) (noting the right of all citizens to be "free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement"), *overruled in part on other grounds by Edelman v. Jordan,* 415 U.S. 651, 670-71 (1974). The identification policy requires that airline passengers either present identification or be subjected to a more extensive search. The more extensive search is similar to searches that we have determined were reasonable and "consistent with a full recognition of appellant's constitutional right to travel." *United States v. Davis,* 482 F.2d 893, 912-13 (9th Cir. 1973).

In *Davis,* an airline employee searched the defendant's briefcase as part of the airport's preboarding screening procedure. Although we remanded for further consideration of whether the defendant consented to the search, we held that airport screening searches of potential passengers and their immediate possessions for weapons and explosives is reasonable so long as each potential passenger maintains the right to leave the airport instead of submitting to the search. *Id.* at 912. In so holding, we considered several airport screening procedures, including behavioral profiling, magnetometer screening, identification check, and physical search of the passenger's person and carry-on baggage. *Id.* at 900. We

see little difference between the search measures discussed in *Davis* and those that comprise the "selectee" search option of the passenger identification policy at hand. Additionally, Gilmore was free to decline both options and use a different mode of transportation. In sum, by requiring Gilmore to comply with the identification policy, Defendants did not violate his right to travel.

IV. Fourth Amendment

Gilmore next alleges that both options under the identification policy – presenting identification or undergoing a more intrusive search – are subject to Fourth Amendment limitations and violated his right to be free from unreasonable searches and seizures.

Request For Identification

Gilmore argues that the request for identification implicates the Fourth Amendment because "the government imposes a severe penalty on citizens who do not comply." Gilmore highlights the fact that he was once arrested at an airport for refusing to show identification and argues that the request for identification "[i]mposes the severe penalty of arrest." Gilmore further argues that the request for identification violates the Fourth Amendment because it constitutes "a warrantless general search for identification" that is unrelated to the goals of detecting weapons or explosives.

The request for identification, however, does not implicate the Fourth Amendment. "[A] request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *INS v. Delgado,* 466 U.S. 210, 216 (1984). Rather, "[a]n individual is seized within the meaning

of the fourth amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. $25,000 U.S. Currency,* 853 F.2d 1501, 1504 (9th Cir. 1988) (internal quotation marks omitted). In *Delgado,* the Supreme Court held that INS agents' questioning of factory workers about their citizenship status did not constitute a Fourth Amendment seizure. In *$25,000 U.S. Currency,* we held that a DEA agent's request for identification from a person waiting to board a flight was not a Fourth Amendment seizure.

Similarly, an airline personnel's request for Gilmore's identification was not a seizure within the meaning of the Fourth Amendment. Gilmore's experiences at the Oakland and San Francisco airports provide the best rebuttal to his argument that the requests for identification imposed a risk of arrest and were therefore seizures. Gilmore twice tried to board a plane without presenting identification, and twice left the airport when he was unsuccessful. He was not threatened with arrest or some other form of punishment; rather he simply was told that unless he complied with the policy, he would not be permitted to board the plane. There was no penalty for noncompliance.

Request To Search

Gilmore argues that the selectee option is also unconstitutional because the degree of intrusion is unreasonable. We reject this argument because it is foreclosed by our decisions in *United States v. Davis,* 482 F.2d 893 (9th Cir. 1973) and *Torbet v. United Airlines, Inc.,* 298 F.3d 1087 (9th Cir. 2002). The identification policy's search option implicates the Fourth Amendment. *See Davis,* 482

F.2d at 895 (holding that the government's participation in airport search programs brings any search conducted pursuant to those programs within the reach of the Fourth Amendment). Airport screening searches, however, do not per se violate a traveler's Fourth Amendment rights, and therefore must be analyzed for reasonableness. *Id.* at 910. As we explained in *Davis*:

> To meet the test of reasonableness, an administrative screening search must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it. It follows that airport screening searches are valid only if they recognize the right of a person to avoid search by electing not to board the aircraft.

Id. at 910-11 (footnotes omitted). Gilmore was free to reject either option under the identification policy, and leave the airport. In fact, Gilmore did just that. United Airlines presented him with the "selectee" option, which included walking through a magnetometer screening device, being subjected to a handheld magnetometer scan, having a light body patdown, removing his shoes, and having his bags hand searched and put through a CAT-scan machine. Gilmore declined and instead left the airport.

Additionally, the search option "is no more extensive or intensive than necessary, in light of current technology, to detect weapons or explosives . . . [and] is confined in good faith to [prevent the carrying of weapons or explosives aboard aircrafts]; and . . . passengers may avoid the search by electing not to fly."[11] *Torbet,* 298 F.3d at 1089

[11] We recently held in *United States v. Marquez,* 410 F.3d 612, 616 (9th Cir. 2005), that a handheld magnetometer wand scan is no more intrusive and extensive than necessary.

(describing the requirements for reasonableness as laid out in *Davis*) (citations omitted). Therefore, the search option was reasonable and did not violate Gilmore's Fourth Amendment rights.

Gilmore also suggests that the identification policy did not present a meaningful choice, but rather a "Hobson's Choice," in violation of the unconstitutional conditions doctrine. We have held, as a matter of constitutional law, that an airline passenger has a choice regarding searches:

> [H]e may submit to a search of his person and immediate possessions as a condition to boarding; or he may turn around and leave. If he chooses to proceed, that choice, whether viewed as a relinquishment of an option to leave or an election to submit to the search, is essentially a "consent," granting the government a license to do what it would otherwise be barred from doing by the Fourth Amendment.

Davis, 482 F.2d at 913. Gilmore had a meaningful choice. He could have presented identification, submitted to a search, or left the airport. That he chose the latter does not detract from the fact that he could have boarded the airplane had he chosen one of the other two options. Thus, we reject Gilmore's Fourth Amendment arguments.

V. Right To Associate and Right To Petition the Government

Finally, Gilmore argues that because the identification policy violates his right to travel, it follows that it also violates his right to petition the government and freely associate. These claims, as Gilmore argued in his appellate brief, are based on the notion that "[f]reedom to physically

travel and the free exercise of First Amendment rights are inextricably intertwined." Here, this logic works to Gilmore's detriment. That is, even accepting Gilmore's assertion that there is a connection between the right to travel and First Amendment freedoms, his argument fails because, as we explained, his right to travel was not unreasonably impaired.

Gilmore argues that the identification requirement impinges his First Amendment right to associate anonymously. In support of this argument he relies principally on *Thomas v. Collins,* 323 U.S. 516, 539 (1945), in which the Supreme Court concluded that a registration requirement for public speeches is "generally incompatible with an exercise of the rights of free speech and free assembly." *Thomas,* however, is easily distinguishable from the present case. Unlike the regulation in *Thomas,* the identification policy is not a direct restriction on public association; rather it is an airline security measure.

Further, Gilmore did not allege that he was exercising his right to freely associate in the airport, but rather that he was attempting to fly to Washington, D.C. so that he could exercise his right to associate there. The enforcement of the identification policy did not prevent him from associating anonymously in Washington, D.C. because he could have abided by the policy, or taken a different mode of transport. Although the policy did inconvenience Gilmore, this inconvenience did not rise to the level of a constitutional violation. In the end, Gilmore's free association claim fails because there was no direct and substantial action impairing this right.

Gilmore's right to petition claim similarly fails. Although Gilmore did not fly to Washington, D.C., where he

planned to petition the government for redress of grievances, the identification policy did not prevent him from doing so. The identification policy is not a direct regulation of any First Amendment expressive activity, nor does it impermissibly inhibit such activity. Gilmore's claims that Defendants violated his rights to associate anonymously and petition the government are without merit.

Conclusion

In sum, we conclude that Defendants did not violate Gilmore's constitutional rights by adopting and implementing the airline identification policy. Therefore, his claims fail on the merits and we deny his petition for review.

TRANSFERRED, PETITION DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN GILMORE,

Plaintiff,

v.

JOHN ASHCROFT, in his official capacity as Attorney General of the United States; ROBERT MUELLER, in his official capacity as Director of the Federal Bureau of Investigation; NORMAN MINETA, in his official capacity as Secretary of Transportation; MARION C. BLAKEY, as Administrator of the Federal Aviation Administration; Admiral JAMES M. LOY, in his official capacity as Acting Undersecretary of Transportation for Security; TOM RIDGE, in his official capacity as Chief of the Office of Homeland Security; UAL CORPORATION, aka UNITED AIRLINES; and DOES I-XXX,

Defendants.

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No. C 02-3444 SI

ORDER GRANTING MOTIONS TO DISMISS AND DENYING REQUEST FOR JUDICIAL NOTICE

(Filed Mar. 23, 2004)

Defendants have moved to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted. Having carefully considered the arguments of the parties and the papers submitted, the Court GRANTS the

motions to dismiss[1] and DENIES plaintiff's request for judicial notice.

BACKGROUND

Plaintiff John Gilmore is a California resident who is suing the United States[2] and Southwest Airlines for refusing to allow him to board an airplane on July 4, 2002 without either displaying a government-issued identification consenting to a search. Plaintiff alleges that these security requirements imposed by the United States government and effected by the airline companies violate several of his constitutional rights, including his rights under the First and Fourth Amendments.[3]

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[1] After the initiation of this action, defendant United Air Lines, Inc. filed for Chapter 11 bankruptcy protection. Thus the claims against it are subject to the automatic stay imposed pursuant to 11 U.S.C. § 362(a). On January 17, 2003, in open court, plaintiff and the remaining defendants agreed to sever the claims against defendant United Air Lines, Inc. from the balance of the complaint. In light of the disposition of the balance of the claims in this case, the severed claims against United will be dismissed without prejudice.

[2] The federal defendants are John Ashcroft, in his official capacity as Attorney General of the United States; Robert Mueller, in his official capacity as Director of the Federal Bureau of Investigation; Norman Mineta, in his official capacity as Secretary of Transportation; Marion C. Blakey, as Administrator of the Federal Aviation Administration, substituted for Jane F. Garvey under Rule 25(d)(1); Admiral James M. Loy, in his official capacity as Acting Undersecretary of Transportation for Security, substituted for John W. Magaw under Rule 25(d)(10; and Tom Ridge, in his official capacity as Chief of the Office of Homeland Security

[3] Plaintiff's complaint also alleged equal protection and Freedom of Information Act (FOIA) claims, but plaintiff's lawyer stated in oral argument that plaintiff withdraws these claims. Accordingly, the equal protection and FOIA claim are no longer before this Court.

On July 4, 2002 plaintiff went to the Oakland International Airport and attempted to fly to the Baltimore Washington International Airport to "petition the government for redress of grievances and to associate with others for that purpose." Complaint at 2:2-4. Plaintiff approached the Southwest ticket counter with a ticket that he had previously purchased and was asked to provide identification. Complaint at ¶25. Plaintiff refused and inquired whether there was any way for him to board the plane without showing identification. He was told by the ticket clerk that he could be screened instead. *Id.* Plaintiff also asked the clerk if she knew the origin of this requirement. The clerk expressed uncertainty but speculated that the Federal Aviation Administration ("FAA") might have promulgated the identification rule. *Id.* Plaintiff was told to show identification again when he went to the gate to board the plane. Complaint at ¶ 26. He refused and was not allowed to board the plane. *Id.* Plaintiff spoke with a supervisor who explained that airline policy prohibited allowing plaintiff to board. Complaint at ¶ 27.

LEGAL STANDARD

The Court may dismiss a complaint when it is not based on a cognizable legal theory or pleads insufficient facts to support a cognizable legal claim. *Smilecare Dental Group v. Delta Dental Plan,* 88 F.3d 780, 783 (9th Cir. 1996).

DISCUSSION

Plaintiff's complaint alleges that as a result of the requirement that passengers traveling on planes show identification and his unwillingness to comply with this

requirement, he has been unable to travel by air since September 11, 2001. Plaintiff's complaint asserts causes of action challenging the apparent government policy that requires travelers either to show identification or to consent to a search which involves wanding, walking through a magnetometer or a light pat-down. Whether this is actually the government's policy is unclear, as the policy, if it exists, is unpublished. However, this Court for the purpose of evaluating plaintiff's complaint, assumes such a policy does exist, and reviews plaintiff's complaint accordingly.

Plaintiff asserts the unconstitutionality of this policy on the following grounds: vagueness in violation of the Due Process Clause; violation of the right to be free from unreasonable searches and seizures; violation of the right to freedom of association; and violation of the right to petition the government for redress of grievances.

The federal defendants and airline defendant both brought motions to dismiss. As plaintiffs' claims are common to both sets of defendants, this Court treats them collectively. While there are questions about the private defendant's liability as a state actor and about the federal defendants' liability for the private defendant's actions, as this Court has not found plaintiff's complaint to have alleged a constitutional violation, those issues need not be addressed at this time.

1. Standing

As a preliminary matter, the federal defendants have objected to all of plaintiff's claims other than plaintiff's challenges to the identification requirement. It is unclear from plaintiff's complaint whether he intended to plead

any other claims, but he did allude to the "government's plan to create huge, integrated databases by mingling criminal histories with credit records, previous travel history and much more, in order to create dossiers on every traveling citizen," including creation of "no fly" watchlists. Complaint, ¶ 8. He pointed to newspaper and magazine articles and internet websites describing various activities and directives issued by various federal agencies, including the increased use of the Consumer Assisted Passenger Prescreening System ("CAPPS") in the wake of the terrorist attacks on September 11, 2001. Complaint, ¶¶ 35-50.

The federal defendants argue that "as a threshold matter, plaintiff has standing in this action solely insofar as he challenges an alleged federally-imposed requirement that airlines request identification as part of the screening process at airports. The complaint is devoid of any allegation that plaintiff personally has suffered any injury that is fairly traceable to any other practice, procedure, or criterion that may be used by any defendant in screening airline passengers for weapons and explosives." Motion to Dismiss at 2:21-25.

The only injury alleged by plaintiff was his inability to board a plane as a result of the identification requirement. Article III requires that to have standing a plaintiff must show that (1) he was injured (2) that the injury is directly related to the violation alleged and (3) that the injury would be redressable if plaintiff prevailed in the lawsuit. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

Plaintiff objects to defendants' "no fly" list, to other "watchlists" and to the CAPPS program, but fails to allege

that his name was on any of these lists or that he personally suffered any injury or inconvenience as a result. The federal defendants are correct that plaintiff has not pled injury sufficient to establish Article III standing concerning these other lists and activities.

In the course of his complaint, plaintiff describes certain orders and directives issued by the FAA and the Transportation Security Administration ("TSA"). The Courts of Appeals have exclusive jurisdiction to review orders issued by the FAA and the TSA. Under 49 U.S.C. § 46110(a):

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . under this part may apply for review of the order by filing a petition for review in the United States Courts of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

Jurisdiction to review such orders is vested in the Courts of Appeals, not the district courts.

Accordingly, to the extent that plaintiff pleads causes of action beyond those stemming from the identification requirement, those causes of action are DISMISSED for lack of standing or jurisdiction.

2. Plaintiff's First Cause of Action: violation of the Due Process Clause

Plaintiff alleges that the identification requirement is "unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment because it is vague, being unpublished, and thus provides no way for ordinary people

or reviewing courts to conclusively determine what is legal." Complaint, ¶ 52. This claim directly attacks the policy, regulation, order or directive requiring production of identification at airports.

In this case, the federal defendants refuse to concede whether a written order or directive requiring identification exists, or if it does, who issued it or what it says. They contend, however, that to the extent this action challenges an order issued by the TSA or the FAA, 49 U.S.C. § 46110(a) vests exclusive jurisdiction in the Courts of Appeals to decide the challenge.

The federal defendants also argue that there is no requirement that they issue orders, regulations or policy directives explaining all aspects of the airport security screening process, so that their failure to do so should not result in a finding that policies and procedures are "void for vagueness." Under 49 U.S.C. § 44901(a), the Under Secretary of Transportation for Security is required to "provide for the screening of all passengers and property . . . that will be carried aboard a passenger aircraft," and under 49 U.S.C. § 44902(a), the Under Secretary must prescribe regulations requiring an air carrier to "refuse to transport – [] a passenger who does not consent to a search . . . establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive or other destructive substance." Defendants argue that the government's interest in ensuring the effectiveness of the screening process is a sufficient justification for its failure to provide these regulations to the public.

Because this claim squarely attacks the orders or regulations issued by the TSA and/or the FAA with respect to airport security, this Court does not have jurisdiction to

hear the challenge. As a corollary, without having been provided a copy of this unpublished statute or regulation, if it exists, the Court is unable to conduct any meaningful inquiry as to the merits of plaintiff's vagueness argument. This argument would better be addressed to the Ninth Circuit Court of Appeals or to the Court of Appeals for the District of Columbia Circuit, both of which have jurisdiction to review these matters.

3. Plaintiff's Second Cause of Action: violation of the Fourth Amendment right to be free from unreasonable searches and seizures

A. Request for Identification

Plaintiff alleges that any requirement that he either display government-issued identification or submit to search prior to boarding a plane violates the Fourth Amendment. Complaint at ¶¶ 56-59.

The request for identification, where plaintiff is free to refuse, is not a search and so does not implicate the Fourth Amendment. *See U.S. v. Cirimele,* 845 F.2d 857, 860 (9th Cir. 1988) (D.E.A. agent's request for identification from person in airport was not a seizure within the meaning of the Fourth Amendment). In another context the Supreme Court has held that "[A] request for identification by the police does not, by itself, constitute a Fourth Amendment seizure," explaining:

> Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to

> answer and the police take additional steps . . . to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.

Immigration and Naturalization Service v. Delgado, 466 U.S. 210, 216 (1984). Similarly, in *U.S. v. Black,* 675 F.2d 129, 136 (7th Cir. 1982), the court held that the request that a person in an airport produce his driver's license and airline ticket was not a seizure, and that a seizure occurred only after the officers took and kept the airline ticket and driver's license. The court stated, "Under our reasoning it is clear that the mere request for and voluntary production of such documents does not constitute a seizure, but rather falls into the category of a non-coercive police-citizen encounter." *Id.*

Plaintiff has cited several cases supporting the proposition that requiring identification, under threat of arrest or some other significant penalty for failure to produce identification, may violate the Fourth Amendment. Those cases do not suggest that what happened to Mr. Gilmore, the request that he provide identification alone, violates the Fourth Amendment. For example, in *Lawson v. Kolender,* 658 F.2d 1362, 1367-68 (9th Cir. 1981) (aff'd on other grounds, 461 U.S. 352 (1983)), the court stated that a statute criminalizing the refusal to provide identification violated the Fourth Amendment. Notably, the Court based its decision in part on the fact that criminalizing the refusal to provide identification provides a basis for arrest. *Id.* at 1367. Where individuals are or can be arrested for failing to identify themselves, seizure, and hence the Fourth Amendment, are clearly implicated. Thus, in *Martinelli v. Beaumont,* 820 F.2d 1491 (9th Cir. 1987), the plaintiff was arrested for failure to identify herself, and

the court held that arresting a person for failure to identify herself violated the Fourth Amendment. Similarly in *Carey v. Nevada Gaming Board,* 279 F.3d 873, 880 (9th Cir. 2000), the Court found a Fourth Amendment violation in a statute which made it a misdemeanor for individuals detained on reasonable suspicion of having committed a crime to refuse to identify themselves.

In plaintiffs' case, he was not required to provide identification on pain of criminal or other governmental sanction. Identification requests unaccompanied by detention, arrest, or any other penalty, other than the significant inconvenience of being unable to fly, do not amount to a seizure within the meaning of the Fourth Amendment. Plaintiff has not suggested that he felt that he was not free to leave when he was asked to produce identification. None of the facts submitted by plaintiff suggests that the request for identification implicated plaintiff's Fourth Amendment rights. Therefore, plaintiff's claim that the identification requirement is unreasonable does not raise a legal dispute that this Court must decide.

Defendants, while contending that the request for identification was neither a search nor a seizure, did nevertheless argue at some length that the request for identification is a reasonable means of effectuating the purpose of airline safety and meeting the requirements of 49 U.S.C. § 114(h)(2)-(3). That statute requires the TSA to establish procedures for informing airlines of the identity of "individuals known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline of passenger safety" (49 U.S.C. § 114(h)(2)), and to establish policies that enable air carriers to identify people "on passenger lists who may be a threat" (49 U.S.C. § 114(h)(3)(A)) and prevent them from boarding an aircraft (49 U.S.C.

§ 114(h)(3)(B)). Defendants argue that verifying passengers' identity is a reasonable means of effectuating the purpose of the statute.

It appears to this Court that the requirement that identification be provided before boarding an airplane is a minimal intrusion on personal privacy and is a reasonable, if modest, step toward ensuring airline safety. It may be, as plaintiff argues, that easy access to false identification documents will reduce the effectiveness of the effort, but the effort itself seems a reasonable one. However, in light of this Court's finding that no search or seizure occurred, no finding concerning the reasonableness of the identification requirement is required.

B. Request to consent to search

Under this circuit's jurisprudence, Southwest's request that the plaintiff submit to search may have constituted a seizure subject to Fourth Amendment scrutiny. When the government is significantly involved in a plan to search, state action, and thus the Fourth Amendment, may be implicated. The Ninth Circuit has held that an airport search is a "functional, not merely a physical process . . . [that] begins with the planning of the invasion and continues until effective appropriation of the fruits of the search for subsequent proof of an offense." *U.S. v. Davis,* 482 F.2d 893, 896 (9th Cir. 1973). Under these stringent guidelines, the request that plaintiff consent to search may have been tantamount to a search for purposes of Fourth Amendment analysis, even though the only part of the search that occurred was the planning.

However, if a search did occur, the search was reasonable. An airport screening search is reasonable if: "(1) it is

not more extensive or intensive than necessary . . . ; (2) it is confined in good faith to [looking for weapons and explosives]; and (3) passengers my avoid the search by electing not to fly." *Torbet v. United Airlines,* 298 F.3d 1087, 1089 (9th Cir. 2002); *see United States v. Davis,* 482 F.2d at 895 (9th Cir. 1973) ("We hold further that while 'airport screening searches' per se do not violate a traveler's rights under the Fourth Amendment, or under his constitutionally protected right to travel, such searches must satisfy certain conditions, among which is the necessity of first obtaining the 'consent' of the person to be searched."). In *Torbet* the Court held that the placement of luggage on an x-ray conveyor belt was an implied consent to a luggage search. 298 F.3d at 1089. At all times plaintiff was free to leave the airport rather than submit to search. Further, searches of prospective passengers are reasonable and a necessary [sic] as a means for detecting weapons and explosives. *Torbet v. United Airlines. Inc.,* 298 F.3d at 1089-90. Accordingly, the request that plaintiff consent to search was reasonable and not in violation of the Fourth Amendment.

3. Plaintiff's Third and Fourth Causes of Action: violation of the right to travel protected by the Due Process Clause

Plaintiff alleges that the right to "travel at home without unreasonable government restriction is a fundamental constitutional right of every American citizen and is subject to strict scrutiny." ¶ 61. Defendant Southwest Airlines notes that the right to travel has not been found by the courts to be contained within the constitutional amendments cited by plaintiff. Southwest advocates dismissal on these grounds. Defs' Motion to Dismiss at 2,

n.1. The Court declines to dismiss on these grounds as the notice pleading standard requires this Court to liberally construe plaintiff's complaint. The right to travel, while sometimes elusive, is clearly grounded in the Constitution. The Supreme Court has located it at times in the Privileges and Immunities Clause of Article IV, the Commerce Clause, the Privileges and Immunities Clause of the Fourteenth Amendment and the "federal structure of government adopted by our Constitution." *Att'y Gen. of New York v. Soto-Lopez,* 476 U.S. 898, 902 (1986).

However, plaintiff's allegation that his right to travel has been violated is insufficient as a matter of law because the Constitution does not guarantee the right to travel by any particular form of transportation. *Miller v. Reed,* 176 F.3d 1202, 1205 (9th Cir. 1999) ("[B]urdens on a single mode of transportation do not implicate the right to interstate travel."); *Monarch Travel Serv. Assoc. Cultural Clubs, Inc.,* 466 F.2d 552 (9th Cir. 1972). The right to travel throughout the United States confers a right to be "uninhibited by statutes, rules and regulations which unreasonably burden or restrict this movement." *Saenz v. Roe,* 526 U.S. 486, 499 (9th Cir. 1973). This Court rejects plaintiff's argument that the request that plaintiff either submit to search, present identification, or presumably use another mode of transport, is a violation of plaintiff's constitutional right to travel.

4. Plaintiff's Fourth Cause of Action: violation of the right to freedom of association protected by the First and Fifth Amendments

Plaintiff's allegation that his right to associate freely was violated fails because the only actions which violate this right are those which are "direct and substantial or

significant." *Storm v. Town of Woodstock,* 944 F. Supp. 139, 144 (N.D.N.Y. 1996). Government action which only indirectly affects associational rights is not sufficient to state a claim for violation of the freedom to associate. To the extent that plaintiff alleged plans to exercise his associational rights in Washington, D.C., the Court finds that plaintiff's rights were not violated as plaintiff had numerous other methods of reaching Washington.

5. Plaintiff's Fifth Cause of Action: violation of the right to petition the government for redress of grievances protected by the First Amendment

Plaintiff alleges that "[t]he right to petition the government for redress of grievances is a fundamental Constitutional right, subject to strict scrutiny" and that this right is "burdened by requiring Petitioners to identify themselves, and by preventing Petitioners from traveling to where the seat of government is located." Complaint at ¶ 69. The right to petition the government for redress of grievances has been "held to be enforceable against the states by virtue of the Fourteenth Amendment." *See Hilton v. City of Wheeling,* 209 F.3d 1005, 1006-07 (7th Cir. 2000). But the right to petition the government for redress of grievances is only implicated by governmental action that prevents the exercise of such a right. *Id.* Although the government's refusal to let Mr. Gilmore board an airplane on Mr. Gilmore's terms may have made it more difficult for him to petition the government for redress, he certainly was not altogether prevented from doing so. Therefore, Mr. Gilmore's argument that his constitutional right to petition the government for redress was violated is rejected.

6. Plaintiff's request for judicial notice

Plaintiff filed a request for judicial notice of The Privacy Commissioner of Canada's "Annual Report to Parliament." The Court may take judicial notice of adjudicative facts (Fed. R. Evid. 201(a) and (b)), and under certain circumstances must take judicial notice of those adjudicative facts which are reasonably beyond dispute (Fed. R. Evid. 201(d)). "Adjudicative facts" are "the facts of the particular case." The opinions of the Canadian government regarding privacy issues are not relevant to the adjudication of this dispute. Therefore, the report is not an adjudicative fact, as it is beyond the scope of this case. Further, the Court did not rely on this report in evaluating defendants' motions to dismiss. For the foregoing reasons, the Court declines to take judicial notice of this report.

CONCLUSION

For the foregoing reasons, plaintiff's complaint is dismissed. Plaintiff's claims against the federal defendants and Southwest Airlines are dismissed with prejudice; plaintiff's claims against United Airlines are dismissed without prejudice. Plaintiff's request for judicial notice is denied. [Docket ## 6, 8, 10, 22, 28].

IT IS SO ORDERED.

Dated: March 19, 2004

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN GILMORE, Plaintiff-Appellant, v. ALBERTO R. GONZALES, Attorney General, in his official capacity as Attorney General of the United States; et al., Defendants-Appellees.	No. 04-15736 D.C. No. CV-02-03444-SI Northern District of California, San Francisco ORDER (Filed Apr. 5, 2006)

Before: TROTT, T.G. NELSON, and PAEZ, Circuit Judges.

Appellant's petition for panel rehearing is DENIED.

The full court has been advised of Appellant's petition for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the case en banc. Fed. R. App. P. 35(b). Therefore the petition for rehearing en banc is DENIED.

49 U.S.C. § 114(s). **Transportation Security Administration.**

(s) Nondisclosure of security activities. –

(1) In general. – Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would –

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or financial information; or

(C) be detrimental to the security of transportation.

(2) Availability of information to Congress. – Paragraph (1) does not authorize information to be withheld from a committee of Congress authorized to have the information.

(3) Limitation on transferability of duties. – Except as otherwise provided by law, the Under Secretary may not transfer a duty or power under this subsection to another department, agency, or instrumentality of the United States.

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49 U.S.C. § 40119. **Security and research and development activities.**

(a) General requirements. – The Under Secretary of Transportation for Security and the Administrator of the Federal Aviation Administration each shall conduct research (including behavioral research) and development activities appropriate to develop, modify, test, and evaluate a system, procedure, facility, or device to protect passengers and property against acts of criminal violence, aircraft piracy, and terrorism and to ensure security.

(b) Disclosure. – (1) Notwithstanding section 552 of title 5 and the establishment of a Department of Homeland Security, the Secretary of Transportation shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title if the Secretary of Transportation decides disclosing the information would –

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or financial information; or

(C) be detrimental to transportation safety.

(2) Paragraph (1) of this subsection does not authorize information to be withheld from a committee of Congress authorized to have the information.

(c) Transfers of duties and powers prohibited. – Except as otherwise provided by law, the Under Secretary may not transfer a duty or power under this section to another department, agency, or instrumentality of the United States Government.

***49 U.S.C. § 44902.* Refusal to transport passengers and property.**

(a) Mandatory refusal. – The Under Secretary of Transportation for Security shall prescribe regulations requiring an air carrier, intrastate air carrier, or foreign air carrier to refuse to transport –

(1) a passenger who does not consent to a search under section 44901(a) of this title establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive, or other destructive substance; or

(2) property of a passenger who does not consent to a search of the property establishing whether the property unlawfully contains a dangerous weapon, explosive, or other destructive substance.

(b) Permissive refusal. – Subject to regulations of the Under Secretary, an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.

(c) Agreeing to consent to search. – An agreement to carry passengers or property in air transportation or intrastate air transportation by an air carrier, intrastate air carrier, or foreign air carrier is deemed to include an agreement that the passenger or property will not be carried if consent to search the passenger or property for a purpose referred to in this section is not given.

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49 C.F.R. § 1520.5. Sensitive security information.

(a) *In general.* In accordance with 49 U.S.C. 114(s), SSI is information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would –

(1) Constitute an unwarranted invasion of privacy (including, but not limited to, information contained in any personnel, medical, or similar file);

(2) Reveal trade secrets or privileged or confidential information obtained from any person; or

(3) Be detrimental to the security of transportation.

(b) *Information constituting SSI.* Except as otherwise provided in writing by TSA in the interest of public safety or in furtherance of transportation security, the following information, and records containing such information, constitute SSI:

(1) *Security programs and contingency plans.* Any security program or security contingency plan issued, established, required, received, or approved by DOT or DHS, including –

(i) Any aircraft operator, airport operator, or fixed base operator security program, or security contingency plan under this chapter;

(ii) Any vessel, maritime facility, or port area security plan required or directed under Federal law;

(iii) Any national or area security plan prepared under 46 U.S.C. 70103; and

(iv) Any security incident response plan established under 46 U.S.C. 70104.

(2) *Security Directives.* Any Security Directive or order –

(i) Issued by TSA under 49 CFR 1542.303, 1544.305, or other authority;

(ii) Issued by the Coast Guard under the Maritime Transportation Security Act, 33 CFR part 6, or 33 U.S.C. 1221 *et seq.* related to maritime security; or

(iii) Any comments, instructions, and implementing guidance pertaining thereto.

(3) *Information Circulars.* Any notice issued by DHS or DOT regarding a threat to aviation or maritime transportation, including any –

(i) Information Circular issued by TSA under 49 CFR 1542.303, 1544.305, or other authority; and

(ii) Navigation or Vessel Inspection Circular issued by the Coast Guard related to maritime security.

(4) *Performance specifications.* Any performance specification and any description of a test object or test procedure, for –

(i) Any device used by the Federal government or any other person pursuant to any aviation or maritime transportation security requirements of Federal law for the detection of any weapon, explosive, incendiary, or destructive device or substance; and

(ii) Any communications equipment used by the Federal government or any other person in carrying out or complying with any aviation or maritime transportation security requirements of Federal law.

(5) *Vulnerability assessments.* Any vulnerability assessment directed, created, held, funded, or approved by the DOT, DHS, or that will be provided to DOT or DHS in support of a Federal security program.

(6) *Security inspection or investigative information.* (i) Details of any security inspection or investigation of an alleged violation of aviation or maritime transportation security requirements of Federal law that could reveal a security vulnerability, including the identity of the Federal special agent or other Federal employee who conducted the inspection or audit.

(ii) In the case of inspections or investigations performed by TSA, this includes the following information as to events that occurred within 12 months of the date of release of the information: the name of the airport where a violation occurred, the airport identifier in the case number, a description of the violation, the regulation allegedly violated, and the identity of any aircraft operator in connection with specific locations or specific security procedures. Such information will be released after the relevant 12-month period, except that TSA will not release the specific gate or other location on an airport where an event occurred, regardless of the amount of time that has passed since its occurrence. During the period within 12 months of the date of release of the information, TSA may release summaries of an aircraft operator's, but not an airport operator's, total security violations in a specified time range without identifying specific violations or locations. Summaries may include total enforcement actions, total proposed civil penalty amounts, number of cases opened, number of cases referred to TSA or FAA counsel for legal enforcement action, and number of cases closed.

(7) *Threat information.* Any information held by the Federal government concerning threats against transportation or transportation systems and sources and methods used to gather or develop threat information, including threats against cyber infrastructure.

(8) *Security measures.* Specific details of aviation or maritime transportation security measures, both operational and technical, whether applied directly by the Federal government or another person, including –

(i) Security measures or protocols recommended by the Federal government;

(ii) Information concerning the deployments, numbers, and operations of Coast Guard personnel engaged in maritime security duties and Federal Air Marshals, to the extent it is not classified national security information; and

(iii) Information concerning the deployments and operations of Federal Flight Deck Officers, and numbers of Federal Flight Deck Officers aggregated by aircraft operator.

(iv) Any armed security officer procedures issued by TSA under 49 CFR part 1562.

(9) *Security screening information.* The following information regarding security screening under aviation or maritime transportation security requirements of Federal law:

(i) Any procedures, including selection criteria and any comments, instructions, and implementing guidance pertaining thereto, for screening of persons, accessible property, checked baggage, U.S. mail, stores, and cargo,

that is conducted by the Federal government or any other authorized person.

(ii) Information and sources of information used by a passenger or property screening program or system, including an automated screening system.

(iii) Detailed information about the locations at which particular screening methods or equipment are used, only if determined by TSA to be SSI.

(iv) Any security screener test and scores of such tests.

(v) Performance or testing data from security equipment or screening systems.

(vi) Any electronic image shown on any screening equipment monitor, including threat images and descriptions of threat images for threat image projection systems.

(10) *Security training materials.* Records created or obtained for the purpose of training persons employed by, contracted with, or acting for the Federal government or another person to carry out any aviation or maritime transportation security measures required or recommended by DHS or DOT.

(11) *Identifying information of certain transportation security personnel.* (i) Lists of the names or other identifying information that identify persons as –

(A) Having unescorted access to a secure area of an airport or a secure or restricted area of a maritime facility, port area, or vessel or;

(B) Holding a position as a security screener employed by or under contract with the Federal government

pursuant to aviation or maritime transportation security requirements of Federal law, where such lists are aggregated by airport;

(C) Holding a position with the Coast Guard responsible for conducting vulnerability assessments, security boardings, or engaged in operations to enforce maritime security requirements or conduct force protection;

(D) Holding a position as a Federal Air Marshal; or

(ii) The name or other identifying information that identifies a person as a current, former, or applicant for Federal Flight Deck Officer.

(12) *Critical aviation or maritime infrastructure asset information.* Any list identifying systems or assets, whether physical or virtual, so vital to the aviation or maritime transportation system that the incapacity or destruction of such assets would have a debilitating impact on transportation security, if the list is –

(i) Prepared by DHS or DOT; or

(ii) Prepared by a State or local government agency and submitted by the agency to DHS or DOT.

(13) *Systems security information.* Any information involving the security of operational or administrative data systems operated by the Federal government that have been identified by the DOT or DHS as critical to aviation or maritime transportation safety or security, including automated information security procedures and systems, security inspections, and vulnerability information concerning those systems.

(14) *Confidential business information.*

(i) Solicited or unsolicited proposals received by DHS or DOT, and negotiations arising therefrom, to perform work pursuant to a grant, contract, cooperative agreement, or other transaction, but only to the extent that the subject matter of the proposal relates to aviation or maritime transportation security measures;

(ii) Trade secret information, including information required or requested by regulation or Security Directive, obtained by DHS or DOT in carrying out aviation or maritime transportation security responsibilities; and

(iii) Commercial or financial information, including information required or requested by regulation or Security Directive, obtained by DHS or DOT in carrying out aviation or maritime transportation security responsibilities, but only if the source of the information does not customarily disclose it to the public.

(15) *Research and development.* Information obtained or developed in the conduct of research related to aviation or maritime transportation security activities, where such research is approved, accepted, funded, recommended, or directed by the DHS or DOT, including research results.

(16) *Other information.* Any information not otherwise described in this section that TSA determines is SSI under 49 U.S.C. 114(s) or that the Secretary of DOT determines is SSI under 49 U.S.C. 40119. Upon the request of another Federal agency, TSA or the Secretary of DOT may designate as SSI information not otherwise described in this section.

(c) *Loss of SSI designation.* TSA or the Coast Guard may determine in writing that information or records

described in paragraph (b) of this section do not constitute SSI because they no longer meet the criteria set forth in paragraph (a) of this section.

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49 C.F.R. § 1542.303. Security Directives and Information Circulars.

(a) TSA may issue an Information Circular to notify airport operators of security concerns. When TSA determines that additional security measures are necessary to respond to a threat assessment or to a specific threat against civil aviation, TSA issues a Security Directive setting forth mandatory measures.

(b) Each airport operator must comply with each Security Directive issued to the airport operator within the time prescribed in the Security Directive.

(c) Each airport operator that receives a Security Directive must –

(1) Within the time prescribed in the Security Directive, verbally acknowledge receipt of the Security Directive to TSA.

(2) Within the time prescribed in the Security Directive, specify the method by which the measures in the Security Directive have been implemented (or will be implemented, if the Security Directive is not yet effective).

(d) In the event that the airport operator is unable to implement the measures in the Security Directive, the airport operator must submit proposed alternative measures and the basis for submitting the alternative measures to TSA for approval. The airport operator must submit the proposed alternative measures within the time prescribed

in the Security Directive. The airport operator must implement any alternative measures approved by TSA.

(e) Each airport operator that receives a Security Directive may comment on the Security Directive by submitting data, views, or arguments in writing to TSA. TSA may amend the Security Directive based on comments received. Submission of a comment does not delay the effective date of the Security Directive.

(f) Each airport operator that receives a Security Directive or an Information Circular and each person who receives information from a Security Directive or an Information Circular must:

(1) Restrict the availability of the Security Directive or Information Circular, and information contained in either document, to those persons with an operational need-to-know.

(2) Refuse to release the Security Directive or Information Circular, and information contained in either document, to persons other than those who have an operational need to know without the prior written consent of TSA.